Supreme Court, U.S.
FILED
NOV 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1031

In the Supreme Court of the United States

OCTOBER TERM, 1989

CITIBANK, N.A., PETITIONER

v.

NGOC QUANG TRINH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

THOMAS W. MERRILL
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ABRAHAM D. SOFAER
Legal Adviser
Department of State
Washington, D.C. 20520

EDITH E. HOLIDAY
General Counsel
Department of the Treasury
Washington, D.C. 20220

J. VIRGIL MATTINGLY
General Counsel
Board of Governors of the Federal Reserve System
Washington, D.C. 20551

MARK I. ROSEN
Deputy General Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

ROBERT B. SERINO
Acting Chief Counsel
Office of the Comptroller of the Currency
Washington, D.C. 20219

QUESTION PRESENTED

Whether, contrary to the design of federal banking regulation, a United States bank may be held liable for deposits made with its branch in a foreign country when the foreign government prevents the branch from repaying those deposits.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	7
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398 (1964) 13, 19

Bluebird Undergarment Corp. v. *Gomez*, 139 Misc. 742, 249 N.Y.S. 319 (City Ct. 1931) 5

Boyle v. *United Technologies Corp.*, 108 S. Ct. 2510 (1988) 18

City of Milwaukee v. *Illinois*, 451 U.S. 304 (1981) 18

Claim of Hugh R. Harris, In re, Dec. No. V-0446 (Foreign Claims Settlement Comm'n Aug. 22, 1985) 12

Dougherty v. *Equitable Life Assurance Society*, 266 N.Y. 71, 193 N.E. 897 (1934) 14

Dougherty v. *National City Bank*, 157 Misc. 849, 285 N.Y.S. 491 (Sup. Ct. 1935) 14

Dunn v. *Bank of Nova Scotia*, 374 F.2d 876 (5th Cir. 1967) 10

Edelmann v. *Chase Manhattan Bank, N.A.*, 861 F.2d 1291 (1st Cir. 1988) 12, 16

Grahfinanciera, S.A. v. *Nordberg*, 109 S. Ct. 2782 (1989) 17

Henneford v. *Silas Mason Co.*, 300 U.S. 577 (1937) 12

Ngoc Dung Thi Tran v. *Citibank N.A.*, 586 F. Supp. 203 (S.D.N.Y. 1983) 15

Perez v. *Chase Manhattan Bank, N.A.*, 61 N.Y.2d 460, 463 N.E.2d 5, 474 N.Y.S.2d 689, cert. denied, 469 U.S. 966 (1984) 19

Cases—Continued: Page

Sokoloff v. *National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924) 12, 13

Sokoloff v. *National City Bank*, 130 Misc. 66, 224 N.Y.S. 102 (Sup. Ct. 1927), aff'd, 223 A.D. 754, 227 N.Y.S. 907, aff'd, 250 N.Y. 69, 164 N.E. 745 (1928) 5, 13, 14

Tat Ba v. *Chase Manhattan Bank, N.A.*, 616 F. Supp. 10 (S.D.N.Y.), aff'd, 762 F.2d 991 (2d Cir. 1985) 14, 15

Tillman v. *National City Bank*, 118 F.2d 631 (2d Cir.), cert. denied, 314 U.S. 650 (1941) 14

United States v. *Belmont*, 301 U.S. 324 (1937) .. 13, 19

United States v. *First Nat'l City Bank*, 379 U.S. 378 (1965) 13, 14

Vishipco Line v. *Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981), cert. denied, 459 U.S. 976 (1982) 4, 6, 7

Zimmerman v. *Sutherland*, 274 U.S. 253 (1927) . 10, 11

Constitution, statutes and regulation:

U.S. Const. Art. III 19

12 U.S.C. 632 4

28 U.S.C. 1332 4

U.C.C. § 4-102(2) (1977) 10

Vietnamese Com. Code:

Art. 701 10

Art. 1206 11

12 C.F.R. 204.128 10

Miscellaneous:

Heininger, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, 11 Law & Pol. Int'l 903 (1979) 5, 6, 12

Restatement (Third) of the Foreign Relations Law of the United States (1987) 14

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1031

CITIBANK, N.A., PETITIONER

v.

NGOC QUANG TRINH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioner Citibank N.A. (Citibank) seeks review of a court of appeals' decision holding that Citibank's New York office is obligated to repay, in dollars, piaster-denominated deposits that a Vietnamese citizen placed with a Citibank branch formerly operated in Saigon, Republic of Vietnam. The court of appeals concluded that the deposit agreement, interpreted under Vietnamese law, absolved Citibank's Saigon branch of liability to respondent when the branch closed in anticipation of Saigon's imminent fall to hostile forces. The court further concluded, however, that respondent could seek repayment from Citibank's New York office because the deposit agreement did not expressly prohibit such an action. See Pet. App. 1a-32a.[1]

[1] Citibank also has filed a petition for a writ of certiorari seeking review of a decision of the United States Court of Appeals for the Second Circuit holding that Citibank's New York office is obligated to repay two Eurodollar

1. During the Vietnam conflict, Citibank maintained a branch office (Citibank/Saigon) in the Republic of Vietnam (South Vietnam).[2] Citibank operated Citibank/Saigon in accordance with Vietnamese law, which required that Citibank conduct its banking operations through a branch (rather than a subsidiary), that the branch keep all of its assets in the local currency (piasters), and that it maintain a specified level of paid-in capital reserves. Citibank/Saigon accepted passbook savings deposits from Vietnamese citizens, paid interest far in excess of that available on United States accounts, and required that depositors execute a standard deposit agreement setting forth withdrawal conditions and liability provisions. Pet. App. 2a-3a, 20a-21a.

On July 25, 1974, Quang Quy Trinh, a retired Vietnamese senator, opened a passbook savings account at Citibank/Saigon. He deposited 2 million piasters, named himself and respondent (his son who was attending school in Michigan) as joint account holders, and signed the branch's standard deposit agreement. The agreement stated that the deposits would be payable only at "Citibank's place of business," which was identified as "28-30 Nguyen Van Thinh, Saigon, 1 Republic of Vietnam," and that they would be payable only in the form of piasters. In addition, the deposit agreement stated that "Citibank does not accept responsibility for any loss or damage suffered or incurred by any depositor resulting from government orders, laws, levies, taxes, embargoes, moratoriums, exchange restrictions or from any other cause beyond its control." On October 25, 1974, Senator Trinh deposited an additional 1 million piasters. At that time, Citibank/Saigon paid interest on passbook savings accounts at a rate of 19% annually, compounded daily. Pet. App. 2a-3a, 20a-21a.

---

deposits that a Singapore bank placed with a Citibank branch located in Manila, Republic of the Philippines. See *Citibank, N.A.* v. *Wells Fargo Asia Ltd.*, No. 88-1260. The Solicitor General has filed a separate brief setting forth the United States' views in that case.

[2] Our amicus curiae brief in *Citibank, N.A.* v. *Wells Fargo Asia Ltd.*, No. 88-1260, provides a brief description of the federal law governing foreign branch operations. See U.S. Amicus Br. 2-3.

In April 1975, hostile forces converged on Saigon. The American Embassy developed plans for the evacuation of United States and selected Vietnamese citizens, including Citibank employees. During this period, Citibank/Saigon informally encouraged its depositors to withdraw their money, but "the situation did not safely allow for the posting of formal notices suggesting such withdrawals" (Pet. App. 4a, 21a). On April 24, 1975, Citibank/Saigon ceased operations, and its officers and employees left the city. The officers left the books and records at the branch and entrusted the branch's cash, keys, vault combination, and official documents to Embassy officials with instructions that the items should be turned over to the National Bank of Vietnam, the government's central banking authority. The following day, the Vietnamese government issued a communique stating that Citibank/Saigon had "closed temporarily without asking for permission" and that "the National Bank guarantees to return all the money legally deposited." *Id.* at 4a, 5a, 21a-22a.

On April 30, 1975, the Vietnamese government collapsed and the following day the revolutionary forces announced the formation of a communist administration. The new government declared that all banks would be "confiscated and, from now on, managed by the revolutionary administration" (Pet. App. 4a, 22a). The communist government reopened the National Bank of Vietnam and stated that it intended to liquidate "all debtor banks, including all foreign banks" and "pay out savings to workers and people according to new banking regulations" (*id.* at 22a). In the case of "banks whose owners have fled the country, the national bank will inventory and re-evaluate their assets and settle their accounts in order to determine their ability to return the savings of account holders" (*id.* at 23a). The National Bank indicated that "the savings accounts of workers, who legitimately earn their income through their own efforts and labor, will gradually be paid to them," but the property of "comprador bourgeoisie" would be "confiscated completely or partly according to the gravity of their crimes." *Id.* at 4a-5a, 23a, 51a-52a.

Senator Trinh was placed in a "re-education" camp. After his release in 1980, he sent his Citibank passbook to respondent, who

resided in Michigan and had become a United States citizen. Respondent contacted Citibank's New York office and requested payment of the deposit. Citibank informed respondent that the National Bank of Vietnam was now responsible for the account. Pet. App. 5a, 38a.

2. Respondent brought suit in the United States District Court for the Eastern District of Michigan to collect the sums allegedly owed under the deposit agreement. After a bench trial, the district court concluded that Citibank was liable and awarded respondent the current value of the account—$1400 plus interest. Pet. App. 37a-59a. The district court began its analysis by noting that the Second Circuit had held in *Vishipco Line* v. *Chase Manhattan Bank, N.A.*, 660 F.2d 854 (1981), cert. denied, 459 U.S. 976 (1982), that a United States bank was liable to its Vietnamese depositors when it closed its Saigon branch in virtually identical circumstances. See Pet. App. 38a-39a. It therefore viewed the question as whether this case was distinguishable from *Vishipco*.

The district court first concluded that it could properly exercise jurisdiction because the parties satisfied the diversity of citizenship requirement (28 U.S.C. 1332) and, alternatively, because disputes arising out of foreign banking transactions are "deemed to arise under the laws of the United States" (12 U.S.C. 632). See Pet. App. 39a-40a. The court next agreed with Citibank that, under either jurisdictional basis, the applicable choice of law rules dictated that Vietnamese law governed the dispute. *Id.* at 41a-44a. The court then concluded that while *Vishipco* was decided under New York law, the same result would obtain under Vietnamese law, including Vietnamese principles of *force majeure*. *Id.* at 45a-50a. It also concluded that Citibank had failed to prove that the National Bank of Vietnam had assumed liability for respondent's account; instead, the court ruled as a matter of law that when Citibank closed its Saigon branch the home office assumed liability for that account. *Id.* at 50a-51a. The court then converted the value of the piaster account into dollars to determine Citibank's liability. *Id.* at 54a-59a.

3. Citibank appealed and the United States filed an amicus curiae brief urging reversal. The court of appeals affirmed (Pet.

App. 1a-32a), rejecting Citibank's "primary argument" that the deposit agreement construed under Vietnamese law placed the risk of loss for a political revolution on the depositor (*id.* at 7a-13a).

The court started from the premise, followed in *Vishipco*, that "it is a general banking principle that the home office is *ultimately liable* on a deposit placed in its foreign branch if, as here, the branch closes or otherwise wrongfully refuses to return a deposit" (Pet. App. 9a, citing *Sokoloff* v. *National City Bank*, 130 Misc. 66, 73, 224 N.Y.S. 102, 114 (Sup. Ct. 1927), aff'd, 223 A.D. 754, 227 N.Y.S. 907, aff'd, 250 N.Y. 69, 164 N.E. 745 (1928); *Bluebird Undergarment Corp.* v. *Gomez*, 139 Misc. 742, 249 N.Y.S. 319 (City Ct. 1931); Heininger, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, 11 Law & Pol. Int'l 903, 926 (1979)). The court acknowledged that "the bank is surely correct in arguing that absent special circumstances, deposits made in branch banks are payable only there" (Pet. App. 9a), but it added:

> However, as we read *Sokoloff*, *Bluebird* and similar cases, one of the "special circumstances" triggering liability against the home office *is* the *closing of a branch*." *Bluebird*, 249 N.Y.S. at 321-22. Thus, while it is true that the payment obligation exists *primarily* between the branch bank and the depositor, the *ultimate* obligation on the deposits remains with the home office. *Id.*; *Vishipco*, 660 F.2d at 863; *see also* Annotation, *Branch Banks*, 136 A.L.R. 471, 493-97 (1942).

Ibid.

The court stated that Vietnamese law supported that conclusion because it required Citibank/Saigon to operate as a branch, rather than a subsidiary, and thereby implicitly indicated that Citibank's home office would be liable for the deposits. *Id.* at 10a. The court concluded that the deposit agreement's waiver of liability for government action "did not dispel these expectations" (*id.* at 11a), observing:

> while we recognize that the deposit agreement absolved the *branch office* of responsibility for losses resulting from

> government orders and "any other cause beyond its control," we do not find in that agreement *any* indication that the depositor could not proceed against the home office if the branch failed to pay.

Ibid. The court stated that contractual provisions limiting home office liability "must be explicit and must clearly and unmistakably inform depositors that they have no right to proceed against the home office" (*id.* at 12a). The court also concluded that Vietnamese principles of *force majeure* did not excuse repayment because Citibank "remains able to this day[ ] to discharge those debts either in New York or at a variety of other points outside of Vietnam" (*id.* at 13a).

The court of appeals also rejected Citibank's defense that the National Bank of Vietnam had assumed liability for the respondent's account. Pet. App. 13a-17a. It concluded that South Vietnam's guarantee that all deposits would be repaid was not legally binding on the new government and that the various communiques failed to establish that, "by confiscating the nation's banks, the new government undertook to assume the *liabilities* of foreign banks, like Citibank Saigon, that fled the country in the face of the fall of South Vietnam" (*id.* at 15a). The court further reasoned, in accordance with *Vishipco*, that when Citibank closed its Saigon branch, "the deposits in Citibank Saigon no longer had their 'situs' in Vietnam" (*id.* at 16a). Instead, their situs "sprang" and attached to the home office, and the Vietnamese government was powerless to affect them (*ibid.*, citing Heininger, *supra*, 11 Law & Pol. Int'l Bus. at 975). Finally, the court agreed with the Second Circuit that holding the home office liable was "fair and equitable under the circumstances" (Pet. App. 17a, citing *Vishipco*, 660 F.2d at 864).

Judge Brown dissented, concluding ("[w]ithout intending to deprecate Citibank's other defenses") that the deposit agreement, read in light of Vietnam's *force majeure* principles, placed the risk of loss on respondent. Pet. App. 19a-32a. He stated:

> I agree with Citibank that Trinh must bear the loss of his savings deposit. I would so hold because I believe the deposit agreement so requires. * * * Here, the communist

> overthrow of South Vietnam and subsequent confiscation and nationalization of Citibank's Saigon branch surely falls within the deposit agreement's discharge-of-liability provision and prevents Citibank's domestic home office from paying Trinh in Vietnam in piasters. Consequently, the deposit agreement calls for Trinh to suffer the loss and, in turn, Trinh's action against Citibank must fail.

Id. at 30a.

DISCUSSION

Citibank asserts that the court of appeals erred in holding that the deposit agreement in this case obligated Citibank's New York office to repay foreign branch deposits when the branch closed on account of imminent invasion. It urges this Court to review the case and clarify, as a matter of federal law, that a United States bank is not liable for repayment of a foreign branch deposit when a foreign sovereign prevents the branch from making repayment. We believe that Citibank is correct in asserting that the court of appeals misconstrued the parties' deposit agreement and the principles of banking law that govern it. We also agree that the decision reflects a departure from established law and could portend future difficulties for United States banking interests. Notwithstanding these failings, we are unable to conclude that this decision, standing alone, would normally warrant this Court's review. Nevertheless, the decision raises issues related to those presented in *Citibank, N.A.* v. *Wells Fargo Asia Ltd.*, No. 88-1260, a case that we believe does merit review. If this Court grants Citibank's petition for a writ of certiorari in *Wells Fargo*, it may wish to grant this petition and to consider the related issues in a consolidated proceeding. In the alternative, it may wish to hold this petition and dispose of it in accordance with its disposition of *Wells Fargo*.

1. This case presents a factual situation that is virtually identical to that presented in *Vishipco Line* v. *Chase Manhattan Bank, N.A.*, *supra*. The Court invited the United States' views concerning the petition for a writ of certiorari filed in that case. The government noted the significant practical consequences of the

court of appeals' decision and expressed serious reservations about the court of appeals' application of the relevant law.[3] The government concluded, however, that the decision did not warrant this Court's review. 81-1591 U.S. Amicus Br. 7. We explained that this isolated decision, which purported to resolve conflicting claims under local contract law, did not present an issue that this Court normally would examine. *Id.* at 15.[4]

The court of appeals in the present case has essentially repeated the Second Circuit's mistakes in *Vishipco*. The court of appeals correctly ruled that the deposit agreement was subject to the law of Vietnam and that Vietnamese law would recognize "general banking principle[s]" that are customarily followed worldwide (Pet App. 7a n.2, 9a).[5] The court erred, however, in applying

---

[3] Our brief noted that the outcome of the case has "significant practical implications," "implicates the interests of federal regulatory agencies," and "raises serious concerns about the protection of American citizens and investments overseas" (81-1591 U.S. Amicus Br. 7). It also expressed "substantial misgivings about the correctness of the decision" (*id.* at 10), noting that the deposit agreement seemed to relieve the bank of liability under the circumstances, that there is "room to doubt whether the 'spring[ing] deposit' theory applied by the court of appeals is soundly grounded in New York law," and that "it could reasonably be concluded that when Vietnam confiscated the assets abandoned by petitioner in Saigon, and thereafter assumed banking operations, it simultaneously assumed responsibility for making repayment to depositors" (*id.* at 10-11). For the convenience of the Court, we have reproduced our amicus curiae brief in *Vishipco* as an addendum to this brief. See Add., *infra*, 1a-17a.

[4] The petition had asserted that the court of appeals erroneously applied the act of state doctrine. We explained that the court of appeals' opinion "does not support that argument. Rather, the court merely applied state law * * * to resolve a somewhat unusual breach of contract dispute. The court's resolution may well be erroneous, but it does not present a substantial federal question" (81-1591 U.S. Amicus Br. 7). We also noted that this result might be avoided in the future "by amendment of the deposit contracts in question, or by separate incorporation in foreign nations that permit that course of action," which in turn "highlight[s] the fact that the decision of the court of appeals turns on the particular deposit contracts consummated by petitioner and respondents, not on any issue of federal law warranting this Court's review" (*ibid.*).

[5] As we explain in our amicus curiae brief in *Citibank, N.A.* v. *Wells Fargo Asia, Ltd.*, *supra*, the courts' references to general banking principles refers

those principles to the parties' deposit agreement. For reasons similar to those we set forth in our *Vishipco* brief, we are unable to say that this case, viewed by itself, has sufficient practical significance to warrant plenary review. Nevertheless, the federal bank regulatory agencies are deeply concerned by the court of appeals' decision, and that concern is magnified by the fact that *Vishipco* is no longer an isolated aberration.

a. As we explain in our amicus curiae brief in *Citibank, N.A.* v. *Wells Fargo Asia Ltd.*, No. 88-1260, there is essentially universal consensus that, as between private parties, " '[t]he situs of a bank's debt on a deposit is considered to be at the branch where the deposit is carried' and that 'the consequence of this limitation is that a debt on a deposit normally authorizes a demand for the money only at the relevant branch' " (U.S. Amicus Br. 10). There is also widespread consensus that, if the branch wrongfully refuses to repay the deposit on demand, the depositor may have a cause of action against the home office for the branch's breach of the deposit agreement. *Id.* at 12-13 n.17. The court of appeals properly assumed that Vietnamese law would recognize these principles. See Pet. App. 9a. The court erred, however, in failing to give effect to the specific terms of the deposit agreement in this case, which (among other matters) expressly stated that Citibank would repay the deposits only at its Saigon place of business and provided that Citibank would *not* be liable for losses resulting from "government" action "or from any other cause beyond its control" (*id.* at 3a, 21a).

There can be no serious dispute that the communist invasion of Saigon prevented Citibank from fulfilling its contractual obligation to repay respondents' account at Citibank's Saigon place of business. Nor can there be any serious dispute that this was the "cause" of respondent's loss and that this cause was beyond Citibank's control. Indeed, the court of appeals recognized that the deposit agreement's disclaimer "absolved the *branch office* of responsibility" in these circumstances. Pet. App. 11a (emphasis in original). The court nevertheless was unable to "find

---

to positive banking law that enjoys virtually universal acceptance. 88-1260 U.S. Amicus Br. 9-10 n.12.

in that agreement *any* indication that the depositor could not proceed against the home office if the branch has failed to pay" (*ibid.* (emphasis in original)). But the court failed to recognize that respondent was entitled to proceed against Citibank's home office only for breach of the deposit agreement, which contractually obligated Citibank to repay respondent's deposit at the *Saigon* branch. Respondent has no cause of action *at all* unless there was an actionable breach of *that* obligation. And there was no actionable breach in this case because the deposit agreement excused a failure to pay that was caused by events beyond Citibank's control. As Judge Brown's dissent recognizes, the deposit agreement's disclaimer must necessarily discharge *both* Citibank's Saigon branch and its home office "if the governmental action or other cause precludes payment in Vietnam in piasters" (*id.* at 30a). The court of appeals' contrary conclusion judicially modifies the essential terms of the parties' agreement and holds Citibank contractually liable for obligations that it specifically declined to undertake.[6]

b. The parties' submissions concerning the law of Vietnam and general banking principles indicate that the same result would obtain even in the absence of the deposit agreement's disclaimer.[7] Article 701 of the Vietnamese Commercial Code (V.C.C.) pro-

[6] Citibank's specific promises to repay the deposit only at Citibank's Saigon's place of business and only in piasters are plainly essential terms of the agreement. Indeed, United States interest rate restrictions and Vietnamese foreign exchange controls prohibited Citibank from offering a Vietnamese citizen a dollar-denominated savings account, earning interest at a 19% annual rate, payable in the United States. See Pet. App. 2a-3a, 27a; C.A. App. 65-66, 70-72. And the court's suggestion that the deposit agreement "must clearly and unmistakably inform depositors that they have no right to proceed against the home office" (Pet. App. 12a) is inconsistent with the general understanding, reflected in the Federal Reserve Board's regulations, that a United States bank's home office is not liable for foreign sovereign interference with a foreign branch's failure to repay a deposit unless the home office expressly undertakes that liability. See 12 C.F.R. 204.128.

[7] American courts would look to the law of the place where the deposit was made to determine whether there has been an actionable breach and any consequent remedy. See, *e.g.*, *Zimmerman* v. *Sutherland*, 274 U.S. 253, 255-256 (1927); *Dunn* v. *Bank of Nova Scotia*, 374 F.2d 876, 877 (5th Cir. 1967); U.C.C. § 4-102(2) (1977).

vides that a "debtor does not have to pay damages if his violation or non-performance of contractual obligations is due to a fortuitous cause or case of *force majeure*" (Pet. App. 8a n.3). Article 1206 of the V.C.C. provides, more specifically, that a "depositary is not liable for accidents or risks resulting from *force majeure*, unless previously he had been given notice to return the deposited objects" (*ibid.*). As we have explained, Citibank's contractual obligation was to repay respondent's funds, in the form of piasters, *solely* at Citibank's place of business, which the deposit agreement defined as the Citibank/Saigon branch. As the court of appeals acknowledged (*id.* at 13a), the circumstances that prevented Citibank from fulfilling that contractual obligation fell within the meaning of *force majeure*. Since Vietnamese law provided that Citibank "is not liable" and "does not have to pay damages" (*id.* at 8a n.3, 12a) in those circumstances, it relieved Citibank of its contractual obligation. The court of appeals' suggestion that Vietnamese law "did not relieve Citibank of its obligation to perform elsewhere" (*id.* at 13a) again overlooks the fact that Citibank's contractual obligation was to perform at *Citibank/Saigon*. As Justice Holmes stated in a similar circumstance involving an Austria-Hungarian bank account:

> The only primary obligation was that created by the law of Austria-Hungary and if by reason of an attachment of property or otherwise the courts of the United States also gave a remedy the only thing that they could do with justice was to enforce the obligation as it stood, not to substitute something else that seemed to them about fair.

Zimmerman v. *Sutherland*, 274 U.S. 253, 255 (1927). Thus, "if that law discharged the debt the debt was discharged everywhere" (*id.* at 256).

c. The court of appeals also seems to have erred in rejecting Citibank's contention that the new Vietnamese government, which had "confiscated" Citibank's branch (Pet. App. 4a), had assumed responsibility for the depositor's account. The court's conclusion is inconsistent with common sense and the practical realities of the communist overthrow of the Vietnamese government. Indeed, the new government's own communiques stated that the government's central bank would liquidate "all debtor banks, including

all foreign banks," and "pay out savings to workers and people according to new banking regulations" (*id.* at 22a; see also *id.* at 5a, 23a). The court's conclusion is also inconsistent with the Foreign Claims Settlement Commission's determination that "accounts in South Vietnamese banks owned by persons or entities located outside the country were nationalized, expropriated, or otherwise taken, within the meaning of the present [International Claims Settlement] Act, as of May 1, 1975." See *In re Claim of Hugh R. Harris*, Dec. No. V-0446, at 2 (Aug. 22, 1985) (Citibank C.A. Br. App. C).

The court of appeals' alternative ruling that the new Vietnamese government could not have seized the deposit also is unsatisfactory. The court endorsed *Vishipco*'s "springing debt" theory, which holds that if a bank closes a foreign branch, " 'the situs of the debt represented by the deposit would spring back and cling to the home office' " (Pet. App. 16a & n.5). See also *Edelmann* v. *Chase Manhattan Bank, N.A.*, 861 F.2d 1291, 1304 (1st Cir. 1988) (dicta). This theory has no firm foundation in the law; instead, it rests on a metaphor that a commentator used to describe Judge Cardozo's decision in *Sokoloff* v. *National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924). See Heininger, *supra*, 11 Law & Pol. Int'l Bus. at 975. As Justice Cardozo himself later warned, "Catch words and labels * * * are subject to the dangers that lurk in metaphors and symbols, and must be watched with circumspection lest they put us off our guard." *Henneford* v. *Silas Mason Co.*, 300 U.S. 577, 586 (1937). This case aptly illustrates that point.

Judge Cardozo's decision in *Sokoloff*—which the New York courts quickly confined to its facts, see note 11, *infra*—addressed whether the Bolshevik government's seizure of a New York bank's Russian branch discharged the bank's liability to a depositor at that branch. The court determined, on the pleadings, that the depositor could maintain an action "based upon the theory of rescission with an accompanying right to restitution" or "based upon the theory of the breach of an outstanding contract" (239 N.Y. at 171, 145 N.E. at 921). The court did *not* determine that the closure of the branch office altered the situs of the debt.[8]

[8] The Court of Appeals made only a brief mention of the situs of the deposit, stating:

The "spring and cling" proposition is simply a commentator's lively, but inaccurate, description of the case.[9]

We believe that Justice Harlan's dissent in *United States* v. *First Nat'l City Bank*, 379 U.S. 378 (1965), correctly explained the principle set forth in *Sokoloff*. The Court held that the district court in that case had jurisdiction to issue a temporary tax injunction freezing a corporation's account in a U.S. bank's Uruguayan branch pending personal service on the corporation (*id.* at 385). It found no occasion to address the *Sokoloff* case (*id.* at 380-381). Justice Harlan disagreed with the Court's holding and in the course of his opinion he described the status of the Uruguayan branch account under *Sokoloff* as follows:

> The bank account is a contract for payment on demand at the Montevideo branch. If demand were wrongfully refused, a cause of action for breach of contract would be created on which [the depositor] could sue in New York. *Thus, analytically, it is not the account itself which would become*

> The intangible chose in action, at least when it is the result of a deposit in a bank, has for some purposes a situs at the residence or place of business of the debtor, though the creditor be far away * * *. The debtor in this instance, though domiciled in the United States, may have had what was equivalent to a residence in Russia while it was doing business at its Russian branch. There is doubt whether its residence in Russia can be said to have continued after its branch had been seized and its business had been closed * * *. The decision of this case does not require that such doubts should be resolved.

239 N.Y at 169, 145 N.E. at 920.

[9] Sokoloff ultimately elected to characterize his suit as a breach of contract action and eventually was awarded damages based on the value of the rubles on deposit on the date that the bank's Russian branch ceased to function. See 130 Misc. 66, 224 N.Y.S. 102 (Sup. Ct. 1927), aff'd, 223 A.D. 754, 227 N.Y.S. 907 (1928). The New York Court of Appeals affirmed the judgment, stating that the bank was precluded from arguing that the Russian government's seizure of its property rendered performance impossible because "the United States has not recognized the Soviet government, and in consequence, the seizure and nationalization of the banks is not an act of government within the recognized principles of international law" (250 N.Y. 69, 81 164 N.E. 745, 749 (1928)). Cf. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 428 (1964); *United States* v. *Belmont*, 301 U.S. 324 (1937).

> *payable in New York, but damages for breach of the contract to pay on demand in Montevideo.*

379 U.S. at 405 n.27 (emphasis added).[10] As we have explained, there is no actionable breach of contract action in this case because the deposit agreement and Vietnamese law absolved a failure to pay where the cause of the failure was beyond the bank's control.[11]

---

[10] See also *Tillman* v. *National City Bank*, 118 F.2d 631, 633 (2d Cir.) ("the deposits in defendant's branches were not converted into continuous deposits payable in New York on account of the closing of the Russian branches"), cert. denied, 314 U.S. 650 (1941); 118 F.2d at 635 (a cause of action for "the frustration of the deposit contract through the closing of the Petrograd branch, or through breach of that contract" was time barred). Accord *Tat Ba* v. *Chase Manhattan Bank, N.A.*, 616 F. Supp. 10 (S.D.N.Y), aff'd without opinion, 762 F.2d 991 (2d Cir. 1985).

[11] Moreover, as Judge Brown correctly observed, "the *Sokoloff* cases simply do not stand for the broad general proposition that an American bank's home office is always ultimately liable for the debts of its foreign branches" (Pet. App. 31a). The New York courts have confined *Sokoloff* to its peculiar facts, which involved a Russian citizen that placed his deposit, in dollars, at the U.S. bank's home office and instructed that the deposit be credited to the foreign branch. See *Dougherty* v. *Equitable Life Assurance Society*, 266 N.Y. 71, 88, 193 N.E. 897, 903 (1934); *Dougherty* v. *National City Bank*, 157 Misc. 849, 862-864, 285 N.Y.S. 491, 506-508 (Sup. Ct. 1935). The *Sokoloff* referee himself drew this distinction, observing that "we are not concerned with questions of liability for transactions originating in Russia and wholly to be performed in Russia, but with a debt incurred in this state which the defendant agreed to pay on demand at its own branch in Petrograd" (130 Misc. at 73-74, 224 N.Y.S. at 114-115). The trial court later added in determining the measure of damages:

> Where the cause of action arose exclusively in the foreign country and the jurisdiction of our courts is secured merely because the debtor has been served or his property has been attached in the state of the forum, the courts here will only grant that relief that the creditor could have secured if the action had been brought in the courts of that country; but where the jurisdiction of our courts was sought to enforce rights which arose under our laws, then the relief would be granted as of the time when the liability accrued under our laws. The decisions in this State are in harmony with the above rule.

130 Misc. at 87, 224 N.Y.S. at 128-129. See also Restatement (Third) of the Foreign Relations Law of the United States § 414 reporter's note 6 (1987) (characterizing *Sokoloff* as involving a "New York depositor").

d. The federal banking agencies, including the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency, are greatly troubled by the court of appeals' fundamental misapplication of familiar banking law principles to the deposit agreement in this case. The Second Circuit's decision in *Vishipco* created substantial uncertainty concerning the status of Vietnamese bank deposits and, more generally, the potential legal liability of United States banks for foreign branch deposits. The court of appeals' decision in this case has only compounded that uncertainty.

As we explained in amicus curiae brief in *Citibank, N.A.* v. *Wells Fargo Asia Ltd., supra*, this Court normally does not review a court of appeals' interpretation of a particular contractual agreement (88-1260 U.S. Amicus Br. 15-16). That case, we have suggested, presents an appropriate occasion for an exception to that general rule because the lower court's interpretation of the Eurodollar deposit agreements at issue there would have immediate and serious consequences for the functioning of the Eurodollar market. In contrast, the practical consequences of the court of appeals' decision in this case are not so immediate that they call as powerfully for this Court's review.

As an initial matter, the dispute in this individual case involves a relatively small amount of money—about $1400 plus accrued interest (Pet. App. 59a). Furthermore, it is not clear that United States banks are likely to face large liabilities for new claims arising from deposits held in Saigon branches during the Vietnam conflict. Other lower courts have rejected claims filed after 1981 on statute of limitations grounds. See *Tat Ba* v. *Chase Manhattan Bank, N.A.*, 616 F. Supp. 10 (S.D.N.Y), aff'd without opinion, 762 F.2d 991 (2d Cir. 1985); *Ngoc Dung Thi Tran* v. *Citibank N.A.*, 586 F. Supp. 203 (S.D.N.Y. 1983).[12] Thus, the

[12] Those courts held that the plaintiffs' suits were necessarily based upon a theory that the closing of the Saigon branches breached the deposit agreements and that the limitation period therefore commenced running upon the closing of the branch. 616 F. Supp. at 12; 586 F. Supp. at 205, 206. That approach implicitly rejects the "springing debt" theory. Other courts, however, have per-

court of appeals' interpretation of the deposit agreement, Vietnamese substantive law, and the actions of the new Vietnamese government with respect to foreign branches, are unlikely to have lasting significance.[13]

Applying the standards that the United States normally employs in determining whether to petition for a writ of certiorari, we therefore cannot say that this case clearly warrants this Court's review. If the court of appeals' decision is viewed in its proper context, it has limited practical or precedential importance. Obviously, the Sixth Circuit's replication of the Second Circuit's errors in *Vishipco* increases the danger that other courts may give those decisions greater credence or broader application than they deserve. In particular, there is a substantial possibility that American courts may mistakenly apply those cases as precedent in interpreting other deposit agreements, other foreign substantive law, and other foreign governmental actions. See *Edelmann* v. *Chase Manhattan Bank, N.A.*, 861 F.2d 1291, 1304 (1st Cir. 1988). But such possibilities are present in many cases in which review is sought from this Court, and we are reluctant to urge that this Court grant the petition based on that ground alone.

That being said, this Court may, by virtue of *Wells Fargo*'s pendency, find benefit in reviewing this case at this time. The court of appeals relied upon the same general banking law principles that are implicated in *Wells Fargo*. If, as we have urged, this Court grants the petition for a writ of certiorari in that case,

---

mitted claims to proceed long after the closing of the foreign branch. See *Edelmann* v. *Chase Manhattan Bank, N.A.*, 861 F.2d 1291 (1st Cir. 1988) (Cuban certificate of deposit).

[13] It is also relevant that, as a prospective matter, United States banks may have greater latitude with respect to passbook savings accounts to set forth terms and conditions concerning home office liability in the event that a foreign government prevents a branch from repaying deposits than those banks have in the minimally documented Eurodollar market. Furthermore, United States banks may be able to amend existing agreements: the deposit agreement in this case subjected the depositor to "all subsequent amendments" of the deposit agreement (C.A. App. 126). We must assume, notwithstanding the decision in this case, that the courts would enforce such agreements or amended agreements in accordance with their terms.

it may wish to grant this petition as well and consolidate the cases for review. That procedure would allow the Court to examine a broader range of issues—and to correct the potentially troublesome decision in this case—with minimal additional expenditure of its limited resources. In the alternative, if the Court grants the *Wells Fargo* petition, it may wish to hold this petition for disposition in accordance with its resolution of that case.

2. Citibank principally argues that the Court should grant review in order to articulate a "uniform federal rule," based on federal preemption or federal common law, "that United States banks are not liable for the risk of foreign sovereign actions preventing or restricting payment of foreign deposits" (Pet. 12). In our view, however, if the Court were to grant the petition in this case it would find it unnecessary to articulate a "uniform federal rule." Citibank argued in the courts below "that the deposit agreement construed under Vietnamese law places the risk of loss for a political revolution on the depositor not on the domestic home office" (Pet. App. 7a). As we have explained, the court of appeals erred in rejecting that argument and correction of that error would provide a sufficient basis for reversal. The question presented in Citibank's petition appears to be sufficiently broad to subsume that issue.

Citibank did not propose to the court of appeals, however, that a "uniform federal rule" governing home office liability for foreign branch deposits applies in this case. This Court generally does not address arguments that the court of appeals did not have an opportunity to consider. See, *e.g.*, *Granfinanciera, S.A.* v. *Nordberg*, 109 S. Ct. 2782, 2788-2789 (1989). This practice rests, at least in part, on prudential concerns. For example, the Court indicated in *Granfinanciera* that it may obtain useful guidance from the considered views of a court of appeals and a district court that have developed a record for review. See *id.* at 2789. That concern is relevant here. For example, Citibank contends (Pet. 19-20; Reply Br. 9-10) that a uniform federal rule is necessary because United States banks may be unable to employ deposit agreements that would unambiguously relieve them of liability. This Court does not have the lower courts' views of this

essentially factual matter. Furthermore, Citibank did not introduce evidence at trial to support that assertion. Thus, the Court may ultimately find that the record in this case is inadequate to assess the matter properly.

There also are important jurisprudential reasons why the Court should decline to address an issue that was not raised below. If "Citibank's primary argument" below is correct and conclusively resolves this case, there is no *need* to search for a broader rationale.[14] The Court should be especially reluctant to employ principles of federal preemption or federal common law to correct a court of appeals' mistaken interpretation of a contractual agreement. As we observe in our amicus curiae brief in *Wells Fargo*, federal preemption and federal common law come into play only if there is a conflict between federal law or policy and otherwise applicable law. See *Boyle* v. *United Technologies Corp.*, 108 S. Ct. 2510, 2515 (1988); *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 312-314 (1981). Those doctrines—which have the far-reaching effect of displacing positive law—are not necessary if otherwise applicable law adequately protects federal interests.

This point has special relevance in the case of banking law. International banking transactions are conducted in accordance with generally understood banking law principles. Federal bank regulation has developed in tandem with, takes account of, and typically reflects those established principles. In most situations, there should be no conflict between federal interests and general banking law principles if the content of each is correctly recognized and applied. This case aptly demonstrates that point. If the court of appeals had correctly interpreted Citibank's agreement with respondent, there would be no conceivable conflict with federal interests.

We cannot say with assurance that this Court may never need to rely on federal preemption or federal common law to resolve

[14] Citibank's call for a "uniform federal rule" may reflect a concern, which we have acknowledged (see p. 15, *supra*), that this Court normally would not review a court of appeals' interpretation of a particular contract. We nevertheless believe that this Court may find it desirable to review such a case in appropriate circumstances. If this case warrants such review, then it warrants reversal on the grounds argued below.

international banking disputes. Indeed, the federal act of state doctrine and the exceptions thereto indicate that judicially-made federal law may figure prominently in such cases.[15] And we cannot deny that an advisory ruling would "provide clarity for bank management and federal regulators" (Pet. 19). But we are obliged to observe that this Court does not exercise its Article III powers for that purpose. Until a conflict materializes, in the form of a concrete legal dispute that requires application of federal law, there is no need to articulate a federal rule.[16]

---

[15] As we explain in our amicus curiae brief in *Wells Fargo* (88-1260 U.S. Amicus Br. 19 & n. 29), the act of state doctrine recognizes that a foreign sovereign has authority to affect debtor-creditor relationships involving debts payable within its jurisdiction. See generally *Banco Nacional de Cuba*, 376 U.S. at 428. Thus, a U.S. bank may be relieved of its obligation to return a deposit if a foreign government seizes the depositor's foreign branch account. See, *e.g.*, *Perez* v. *Chase Manhattan Bank, N.A.*, 61 N.Y.2d 460, 463 N.E.2d 5, 474 N.Y.S.2d 689, cert. denied, 469 U.S. 966 (1984). There is no need to address that issue here, however, because the deposit agreement and provisions of Vietnamese law, properly construed, excused Citibank from performing its contractual obligation to repay the deposit. There is good reason to believe that the court of appeals committed multiple errors in concluding that (1) the new Vietnamese government seized Citibank/Saigion's assets but not its deposit liabilities (see p. 11-12, *supra*); (2) the act of state doctrine would require a U.S. court to honor such a confiscation (cf. *Belmont*, 301 U.S. at 333-334 (Stone, J., concurring)); and (3) federal law (which would govern the situs of a bank deposit for act of state purposes) would recognize the "springing debt" theory (see p. 12-14, *supra*). But there is no occasion to reach any of those questions in this case.

[16] Indeed, we are not aware of any judicial decisions that have addressed the question whether a "uniform federal rule" governs these disputes. We submit that this Court, which would have the last word on the question, should not be the first court to address it.

CONCLUSION

The petition for a writ of certiorari should be disposed of in accordance with the disposition of the petition filed in *Citibank, N.A.* v. *Wells Fargo Asia Ltd.*, No. 88-1260.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

THOMAS W. MERRILL
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

ABRAHAM D. SOFAER
Legal Adviser
Department of State
Washington, D.C. 20520

EDITH E. HOLIDAY
General Counsel
Department of the Treasury
Washington, D.C. 20220

J. VIRGIL MATTINGLY
General Counsel
Board of Governors of the Federal Reserve System
Washington, D.C. 20551

MARK I. ROSEN
Deputy General Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

ROBERT B. SERINO
Acting Chief Counsel
Office of the Comptroller of the Currency

NOVEMBER 1989

ADDENDUM

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1591

THE CHASE MANHATTAN BANK, N.A., PETITIONER

v.

VISHIPCO LINE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. On April 24, 1975, respondents, ten Vietnamese corporations and one Vietnamese individual, held deposit accounts in petitioner's Saigon branch bank (C.A. App. A-24a, A-276).[1] The corporate respond-

[1] "C.A. App." refers to the Joint Appendix filed in the court of appeals.

ents held demand deposit accounts that did not bear interest. The individual respondent held a certificate of deposit that bore interest at the rate of 23½% per year (*id.* at A-24). Under South Vietnamese law and the deposit contracts, the deposits were payable solely in Saigon and solely in piastres, the currency of South Vietnam (*id.* at A-242, A-276). In opening these accounts, each depositor agreed as follows (*id.* at A-24a):

> In accepting this deposit the Bank assumes no responsibility or liability for any losses to the depositor arising out of delays in or interruptions of the Bank's business due to Acts of God, acts of governmental authority, acts of public enemy or due to war, riots, * * * civil commotions, insurrections, * * * or causes beyond the Bank's control.

In addition, the Rules for Accounts of the Saigon branch provided (*id.* at A-572): "The account-holder shall bear the risks resulting from * * * present or future legal provisions promulgated by the state where the account is kept." Those rules were incorporated in all deposit slips used to make piastre deposits.[2]

By April 1975, it became obvious that Saigon would soon fall to the communist forces (C.A. App. A-536 to A-543). Vietcong troops had surrounded Saigon and the frequency of military attacks had increased (*id.* at A-539 to A-542). A cease-fire offer had been refused by the Vietcong (*id.* at A-536), and there was fear of Vietcong reprisals against persons who associated with Americans (*id.* at A-163).

---

[2] See Brief In Opposition to the Motion by the Clearing House Association of New York for Leave to File a Brief as Amicus Curiae at 4.

On April 23, petitioner's senior management in New York decided to recommend "suspending the business operations of the Saigon branch for the protection of the officers and employees" (C.A. App. A-16). That same day, the United States Embassy advised petitioner that space on a cargo jet would be available the following day for evacuation of the branch's employees and families (*id.* at A-185). On April 24, the branch "closed [its] doors" (*id.* at A-186).

When the branch closed its doors, branch officers gave the French Embassy in Saigon the combinations and keys to the locks of the branch's vaults, as well as a set of the branch's records (C.A. App. A-158 to A-159, A-552, A-553). These were turned over to the French Embassy because it was believed that the French and the North Vietnamese had good relations; petitioner also believed that this action would "protect the rights or the interests [of] the depositors, because later on, when the branch would * * * be able to * * * reopen, then the books [would be] protected" (*id.* at A-159). None of the branch's assets were removed from Saigon at the time of evacuation (*id.* at A-160).

Saigon was overrun by communist forces on April 30, 1975. On May 1, the new government issued the following decree (C.A. App. A-548):

> All * * * banks * * * will be confiscated and, from now on, managed by the revolutionary administration.

This decree nationalized all private banks in South Vietnam (*id.* at A-548 to A-551). Pursuant to this decree, the French Embassy in Saigon turned over to the new government the keys to petitioner's Saigon branch and the branch's records (*id.* at A-545 to

A-547). Since then, the entire banking function in Vietnam has been assumed by the government (*id.* at A-548 to A-551, A-544). The government apparently has permitted at least some withdrawals by certain depositors of former private banks (*id.* at A-270 to A-271).

2. Respondents, all Vietnamese nationals, sought repayment of their deposits in dollars at petitioner's home office in New York. When that was denied, they brought suit against petitioner in the United States District Court for the Southern District of New York, invoking the diversity jurisdiction of the district court. Respondents alleged that petitioner breached its deposit contracts when it refused to make payment to them in New York after closing its doors in Saigon (Pet. App. 2a).

Following a bench trial, the district court rendered judgment in favor of petitioner (Pet. App. 1b-14b). The court concluded that petitioner was not liable for the obligations of its Saigon branch because the closing of the branch "was necessitated by the state of the war in the country and the imminent fall of Saigon to communist forces" (*id.* at 11b-12b). There was no evidence that any demand had been made to withdraw the corporate deposits before the branch closed, and shortly thereafter "[a]ll the property of persons who fled Vietnam [was] confiscated by the communist regime" (*id.* at 7b, 12b).[3] The court further concluded that "[u]nder the act of state doctrine that seizure must be given effect by our courts" (*id.* at 12b). Accordingly, "Chase in New York cannot be held accountable for the obligations of its Saigon

[3] The district court found that by the time the certificate of deposit matured, "both the bank and its assets had been taken over by the communist government" (Pet. App. 14b).

branch under the circumstances of this case" (*id.* at 13b).

3. The court of appeals reversed (Pet. App. 1a-25a), concluding that petitioner was not relieved of its contractual deposit obligations by the takeover of its Saigon branch by communist forces. Initially, the court ruled that New York law applied to the contract dispute in this case (*id.* at 10a) because "neither party invoked foreign law with respect to Chase's basic obligations to its depositors and holders of certificates of deposit." The court further concluded (*id.* at 11a) that "[u]nder New York law it is clear that, unless relieved of liability under one or more of the affirmative defenses asserted by it, Chase was obligated under its contracts with plaintiffs to pay them the amounts deposited with it."

The court of appeals rejected petitioner's claim (Pet. App. 14a-16a) that the Vietnamese confiscation decree had the effect of seizing the piastre deposits at issue in this case. The court concluded (*id.* at 15a) that the confiscation order did not encompass the deposits, and that, in any event, "upon Chase's departure from Vietnam the deposits no longer had their situs in Vietnam at the time of the confiscation decree" (*ibid.*). Accordingly, since "Chase had abandoned its Saigon branch at the time of the Vietnamese decree, and since it had no separate corporate identity in Vietnam which would remain in existence after its departure, the Vietnamese decree could not have had any effect on its debt to the corporate plaintiffs" (*ibid.*).

The court of appeals also rejected petitioner's claim that there was no breach of contract because conditions prevailing in Saigon at the relevant time rendered payment impossible. The court concluded (Pet. App. 17a) that "[t]his argument must be rejected

for the reason that impossibility of performance in Vietnam did not relieve Chase of its obligation to perform elsewhere. By operating in Saigon through a branch rather than through a separate corporate entity, Chase accepted the risk that it would be liable elsewhere for obligations incurred by its branch." The court suggested (*id.* at 18a) that "Chase's defenses of impossibility and *force majeure* might have succeeded if the Saigon branch had been locally incorporated or (more problematically) if the deposit contract had included an explicit waiver on the part of the depositor of any right to proceed against the home office." [4]

Finally, the court of appeals rejected petitioner's claim (Pet. App. 18a-19a) that "the Vietnamese government took steps to assume or cancel its branch liabilities." The court determined that the Vietnamese government had confiscated the assets of petitioner, but had not attempted to alter the contracts between petitioner and its depositors. In these circumstances, the court of appeals concluded that Judge Cardozo's opinion in *Sokoloff* v. *National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924), was controlling. The court supported its holding by reference to certain considerations of fairness (Pet. App. 20a):

> A bank which accepts deposits at a foreign branch becomes a debtor, not a bailee, with respect to its depositors. In the event that unsettled local conditions require it to cease operations, it should inform its depositors of the date when its branches will close and give them the opportunity to withdraw their deposits or, if conditions prevent such steps, enable them to obtain payment at an alternative location. * * * In the

---

[4] Under South Vietnamese law, foreign banks were limited to branch operations and could not incorporate local subsidiaries (see Pet. App. 18a).

rare event that such measures are either impossible or only partially successful, fairness dictates that the parent bank be liable for those deposits which it was unable to return abroad.

DISCUSSION

Although the court of appeals has decided a question of banking law of substantial concern to several federal agencies responsible for regulating and insuring the banking industry, the United States is unable to conclude that the decision below warrants further review. The sole claim presented in the petition is that the court of appeals erroneously applied the federal "act of state" doctrine, by questioning the validity or challenging the legal effect of a sovereign act of Vietnam in rendering its judgment. The opinion of the court of appeals does not support that argument. Rather, the court merely applied state law, as it was required to do in this diversity case (*Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938)), to resolve a somewhat unusual breach of contract dispute. The court's resolution may well be erroneous, but it does not present a substantial federal question.

1. The issue in this case is whether a bank's home office is responsible to depositors of a foreign branch when the branch is forced to suspend operations to protect the safety of its personnel, when the foreign government subsequently confiscates the assets of that branch, and when the deposit contracts in question call for repayment solely in local currency in the foreign country and contain a comprehensive force majeure provision. The court of appeals' resolution of this question has significant practical implications.[5] United

[5] A substantial percentage of the Nation's largest banks with foreign branches have home offices within the Second Circuit.

States banks frequently operate abroad through branch offices, and a number of foreign states require them to operate in branch form. At present, United States banks have approximately 850 branches in more than 65 foreign countries, with liabilities of more than $50 billion payable to foreign depositors in foreign currencies.

The court of appeals' decision implicates the interests of federal regulatory agencies responsible for oversight of the American banking industry, including the Comptroller of the Currency who regulates national banks such as petitioner. Because of the large amount of money deposited by foreign nationals in foreign branches of American banks, the court of appeals' decision substantially complicates the regulatory agencies' task of estimating the risk of liquidity posed by the operation of foreign branches. When examining banks with foreign branches, bank examiners have acted on the general understanding that such banks will not be required to honor deposit contracts payable in local currency when the assets of the foreign branch have been confiscated by local authorities. Nor is it expected that local currency deposits will be payable in dollars. However, the court of appeals' decision makes home offices liable for foreign branch deposits without the benefit of the foreign branch's assets to satisfy those liabilities.

The decision below also has significant implications for the Board of Governors of the Federal Reserve System as a bank regulator and "lender of last resort," and for the Federal Deposit Insurance Corporation.[6] Generally, deposits that are payable only

[6] The Overseas Private Investment Corporation, an agency of the federal government (see 22 U.S.C. 2191), is liable to petitioner as a result of the losses incurred in this case.

overseas are not insurable or assessable by the FDIC (see International Banking Facility Deposit Insurance Act, Pub. L. No. 97-110, Section 102, 95 Stat. 1513). Thus, deposits payable abroad at foreign branches of United States banks ordinarily have not been considered to be insured, and assessments generally have not been collected for such deposits. Because the courts of appeals' decision may impose substantial unanticipated liabilities on a bank's home office, the FDIC's costs may be significantly increased in the event of a bank failure (see 12 U.S.C. 1821 and 1823(e)). Similarly, the Federal Reserve System may be called upon to make loans to banks whose foreign branches are seized, in order to prevent financial embarrassment.[7]

Finally, the court of appeals' decision raises serious concerns about the protection of American citizens and investment overseas. The court below appears to have been influenced by the timing of the evacuation of petitioners' employees from Vietnam as well as petitioner's failure to give "notice" to depositors (Pet. App. 15a, 20a). It is contrary to the policy interests of the United States to penalize American banks for evacuating employees in times of emergency, and petitioner appears to have done all that it could to keep its branch open until the communist takeover. Moreover, the effectiveness of any "notice" to depositors under the conditions disclosed by the record in this case is subject to serious doubt.

---

[7] Except where a depositor has received an express guaranty of repayment by the home office, foreign branch deposits have been exempt from the Federal Reserve Board's reserve requirements (12 U.S.C. 461; 12 C.F.R. 204.1) as well as its limitations on interest payments (12 U.S.C. 371a, 371b and 461; 12 C.F.R. Part 217). Thus, in exchange for the safety of a deposit payable at the branch bank's home office, the depositor generally would relinquish the high rate of interest paid to depositors at the bank's foreign branch.

2. *a.* We also have substantial misgivings about the correctness of the decision rendered by the court of appeals. The deposits in question in this case were accepted pursuant to the understanding that "[t]he account-holder shall bear the risks resulting from * * * future legal provisions promulgated by the state where the account is kept" (C.A. App. A-572). In addition, the deposits were accepted subject to a force majeure clause, which disclaimed liability for losses " 'arising out of delays in or interruptions of the Bank's business due to * * * acts of governmental authority, * * * war, * * * insurrections, * * * or causes beyond the Bank's control' " (Pet. App. 6b).[8] The court of appeals' conclusion that these contractual provisions did not relieve petitioner of the obligation to perform elsewhere overlooks the fact that the deposits called for payment in South Vietnam in the currency of South Vietnam (see page 2, *supra*).

Moreover, there is room to doubt whether the "spring[ing] deposit" theory applied by the court of appeals is soundly grounded in New York law and whether, in any event, the court below correctly applied the theory to the facts of this case (see Pet. App. 15a-16a). It appears that the operations of the Saigon branch were merely suspended during the insurgency, as permitted under federal regulatory practice, with the expectation of a resumption of operations at some later time. If that view of the facts were accepted, it would follow that the deposits did not "spring" to New York, but rather remained in Viet-

---

[8] The unusually high rate of return on the certificate of deposit (23½%) may reflect the understanding of the parties of the high degree of risk inherent in placing funds on deposit in the Saigon branch. See note 7, *supra*.

nam and were seized by the new Vietnamese government along with the branch's assets.[9]

Finally, it could reasonably be concluded that when Vietnam confiscated the assets abandoned by petitioner in Saigon, and thereafter assumed banking operations, it simultaneously assumed responsibility for making repayment to depositors—particularly Vietnamese citizens such as respondents. See *Tillman* v. *National City Bank*, 118 F.2d 631, 635-636 (2d Cir. 1941). The Vietnamese decree states that the assets of foreign banks were not only to be "confiscated," but also "managed," by the new government (C.A. App. A-548), and at least some Vietnamese depositors apparently have been able to withdraw some of their funds (*id.* at A-270 to A-271). To condition a bank's contractual liability on the intentions of a foreign government, and then to construe the foreign government's seizure and management of a foreign bank branch as a nationalization of the branch's assets but not its liabilities, could encourage foreign governments to seize foreign branches with the expectation that their citizens will seek recompense from the bank's home office.

b. Respondents' reply to the foregoing arguments is that they have entered into a contract with petitioner Chase Manhattan Bank, not with a single

---

[9] Under the court of appeals' analysis (Pet. App. 15a), petitioner apparently would have been relieved of its deposit obligations had the branch remained open until it was seized by the communist forces, even though that might have meant death or imprisonment for branch employees. Petitioner was held liable, however, because it closed its doors before the communist takeover. It is anomalous to draw a distinction in the timing of the evacuation of branch employees that would penalize the bank for acting in a responsible manner.

branch office. As stated in their Brief in Opposition to the Motion by the Federal Reserve Bank for Leave to File a Brief as Amicus Curiae at 1-2:

> Until April 24, 1975, the petitioner, The Chase Manhattan Bank, N.A., was present and doing business through an office in Saigon, Vietnam. The office was not a subsidiary, was not separately incorporated. Its name, and no one else's appeared on the deposit slips, bank books and other business documents. The Chase Manhattan Bank, N.A., was the debtor of the depositors. * * * No cogent reason has been presented why the banking industry should be so favored as to be treated as if its branch offices were separately incorporated without doing so; to be able to solicit business as if it were a single entity, but to dishonor its liabilities as if they belonged to another corporation.

Thus, after April 24, 1975, "the only place where the depositors could enforce their rights against the Chase was in New York" (*id.* at 4). Respondents assert, moreover, that not all of the deposits in the accounts in question were made in Vietnamese currency. "The corporate respondents were engaged in the shipping business and received 70 to 80 per cent of their earnings in United States dollars. These earnings were deposited to their account at offices and branches of the petitioner in various ports of the world" (Br. in Opp. 2).

The court of appeals essentially accepted respondents' contract theory, concluding that even though repayment may have become impossible in Saigon, it was not impossible for petitioner to make restitution

to its depositors at its home office.[10] And in reaching that result, the court of appeals found support in a prior decision of the New York Court of Appeals that addressed a similar dispute between a depositor and an American bank whose foreign branch had been expropriated. See *Sokoloff* v. *National City Bank*, 239 N.Y. 158, 167, 170, 145 N.E. 917, 919, 920 (1924). As Judge Cardozo explained in *Sokoloff* (239 N.Y. at 166-168, 145 N.E. at 919-920):

> The defendant is not a bailee for the plaintiff, nor were any of its assets ear-marked to the plaintiff's use. * * * The *res* belonging to the plaintiff was not a physical object committed to the defendant's keeping, but an intangible right, a chose in action, the right to receive rubles in the future under an executory contract. * * * The defendant's liability was unaffected by the attempt to terminate its existence and the seizure of its assets. A government of Russia *could* not terminate its existence either by dissolution or by merger, for it was a corporation formed under our laws, and its corporate life continued until the law of its creation declared that it should end. * * * [T]he ending of its Russian business was not the ending of its duty to make restitution for benefits received without requital. As to this, there would be no dispute if its as-

---

[10] Under this view, even though the contracts called for repayment in Vietnamese currency in Saigon, restitution in American dollars would be appropriate if Chase closed its branch and prevented repayment in the prescribed medium at the prescribed location. The record does not indicate whether Chase had Vietnamese currency available at its home office or elsewhere, but because the currency was worthless, respondents did not want their deposits returned in that medium in any event. See note 13, *infra*.

> sets had been left intact. The situation in a legal aspect is not changed by the fact that the property of the Russian branch has been scattered or despoiled. Plaintiff did not pay his money to the defendant, and become the owner of this chose in action, upon the security of the Russian assets. He paid his money to a corporation organized under our laws upon the security of all its assets, here as well as elsewhere. * * * The situation is not changed though it be shown that the new or nationalized bank in appropriating the assets assumed the liabilities. * * * [T]here is still no suggestion of a novation, releasing the defendant and substituting its successor. * * * Its obligation as the primary debtor in its relation to its own creditors continued unimpaired.

Judge Cardozo further explained that the "doctrine of frustration" could not excuse nonpayment by the bank, even though its local assets had been confiscated. Impossibility of performance (in rubles) at its Russian branch was not a bar to restitution (in dollars) in New York (239 N.Y. at 169, 145 N.E. at 920).[11] See also *Sokoloff* v. *National City Bank*, 250 N.Y. 69, 82-83, 164 N.E. 745, 749-750 (1928) (concluding that the force majeure doctrine "does not relieve the defendant from the duty of restoring a sum not in excess of the benefits received. * * A different case would be presented if there were a claim for something more, *i.e.*, for damages for loss of profit"). Compare *Dougherty* v. *Equitable Life Assurance Society*, 266 N.Y. 71, 77, 193 N.E. 897, 898 (1934) (reaching a different result with respect to holders

[11] In *Sokoloff*, in contrast to the present case, the original deposits were made in New York.

of insurance company policies whose rights were determined solely by Russian law).

c. At bottom, the court of appeals has resolved conflicting claims under New York contract law, applying precedents of the highest court of that state. Although we have serious reservations about the correctness of the result reached, and are concerned about its regulatory implications, the decision of the court of appeals in this diversity suit does not appear to fall within that small category of cases properly subject to this Court's discretionary certiorari jurisdiction. See Rule 17.1(a) of the rules of this Court; see also *Burks* v. *Lasker*, 441 U.S. 471, 486 (1979) (the Court does not "'grant certiorari to decide [a question of state law]'"); accord, *Butner* v. *United States*, 440 U.S. 48, 57-58 (1979).

In addition, the court of appeals suggested that the result that it reached could be avoided in future cases by amendment of the deposit contracts in question, or by separate incorporation in foreign nations that permit that course of action (Pet. App. 18a). While both of these proposed solutions may pose practical problems, they highlight the fact that the decision of the court of appeals turns on the particular deposit contracts consummated by petitioner and respondents, not on any issue of federal law warranting this Court's review.

3. Petitioner nonetheless argues (Pet. 6-7) that the decision below warrants review because the court of appeals "decided a federal question" under the "act of state" doctrine, as enunciated by this Court in cases such as *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427-428 (1964).[12]

---

[12] The federal act of state doctrine, where applicable, requires judicial abstention on questions involving inquiry into

The opinion of the court of appeals does not support this argument. The court of appeals did not have occasion either to question the validity, or challenge the legal effect, of any Vietnamese confiscation order. Rather, the court concluded that the Vietnamese confiscation order had no application to the deposit rights here in question. See Pet. App. 15a ("The plain meaning of [the confiscation decree] is that the seizures involved physical assets only and did not reach whatever claim the corporate plaintiffs might have on their departure for payment of the amounts owed to them by Chase"). Moreover, the court also concluded that respondents' deposit rights were not located in Vietnam at the time of the confiscation decree and, therefore, the decree was irrelevant to their ownership. *Ibid.* ("Since Chase had abandoned its Saigon branch at the time of the Vietnamese decree, and since it had no separate corporate identity in Vietnam which would remain in existence after its departure, the Vietnamese decree could not have had any effect on its debt to the corporate plaintiffs").

In these circumstances, we do not believe that the federal "act of state" doctrine is implicated in the disposition of this controversy. The court of appeals attributed responsibility to petitioner for its branch's deposit obligations because of petitioner's contractual agreement with its depositors, not because of any action that may have been taken by the authorities in Vietnam.[13]

---

the validity or permissible legal effect of an official act of a foreign government within its territory. *Underhill* v. *Hernandez*, 168 U.S. 250 (1897).

[13] In the present interlocutory posture of this case, there has been no determination of the amount of compensation owing to respondents. The court of appeals noted that, on re-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfuly submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

STEPHEN M. SHAPIRO
Deputy Solicitor General

ANTHONY J. STEINMEYER
MARC RICHMAN
Attorneys

OCTOBER 1982

---

mand, the district court must arrive at a formula for "just compensation for the breach" (Pet. App. 22a). This will require the district court to determine the value of Vietnamese piastres at the time of the breach, as expressed in American dollars (*id.* at 21a-22a & n.6). Petitioner may be able to establish that, at the relevant time—approximately one week before the fall of South Vietnam—the Vietnamese piastre had a low dollar value as reflected in the prevailing exchange rate. In addition, the court of appeals noted that petitioner will have the opportunity to prove that the official exchange rate "was artificially low and should be replaced by a higher rate" (*ibid.*) due to the impending collapse of the South Vietnamese government and its official currency.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—262-203/00577